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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WALTER CROFT BAGNELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Government induce an out-of-state distributor to ship sexually explicit films to a federal district with which he has had no prior contacts and then indict and convict him for violating the obscenity laws because the films exceed the community standards of the county to which the materials are shipped?

2(a) In a federal obscenity prosecution, may the relevant community be smaller than the federal district wherein the defendant is prosecuted?

2(b) In a case wherein the defendant is indicted for and accused of shipping obscene films to the Southern District of Florida, which includes a conservative county, Dade County, and a liberal county, Broward County, may the District Court exclude prospective jurors from Broward County, draw the jurors solely from Dade County, and direct

them to apply the community standards of only Dade County, and not the entire Southern District of Florida or even Broward County?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982). It is attached hereto as Appendix A.

JURISDICTION

This is a criminal case wherein the United States District Court for the Southern District of Florida had jurisdiction pursuant to 18 U.S.C. Section 3231.

Petitioner was convicted on April 24, 1981 and the United States Court of Appeals for the Eleventh Circuit affirmed the conviction on June 28, 1982. United States v. Bagnell, 679 F.2d 826 (11th Cir. 1982). Appellate Jurisdiction was based on 28 U.S.C. Section 1291.

Petitioner timely filed a Suggestion for Rehearing En Banc and a Petition for Rehearing, both of which were denied on September 21, 1982. A copy of the order of denial is attached hereto as Appendix B.

This Court has jurisdiction to review the judgment of the Court of Appeals by virtue of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2, Paragraph 3 of the Constitution provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be held at such place or places as the Congress may by law have directed.

2. The First Amendment to the Constitution provides, in part, as follows:

> Congress shall make no law ... abridging the freedom of speech ....

3. The Fifth Amendment to the Constitution provides, in part, as follows:

> No person shall be ... deprived of life, liberty, or property, without due process of law ....

4. The Sixth Amendment to the Constitution provides, in part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ....

5. Title 18, United States Code, Section 1462, provides, in part, as follows:

> Whoever ... knowingly uses any ... common carrier, for carriage in interstate ... commerce - (a) any obscene ... motion picture film ... shall be

fined not more than $5,000 or imprisoned not more than five years, or both ....

6. Title 18, United States Code, Section 1465, provides, in part, as follows:

> Whoever knowingly transports in interstate ... commerce for the purpose of sale or distribution any obscene ... film ... shall be fined not more than $5,000 or imprisoned not more than five years, or both....

7. Title 18, United States Code, Section 3237, provides, in part, as follows:

> ...
>
> Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from,

through, or into which such commerce or mail matter moves.

...

STATEMENT OF THE CASE

In early 1977 the Federal Bureau of Investigation began a nationwide investigation into violations of federal obscenity laws. As part of the investigation, FBI Agent Patrick J. Livingston formed a corporation, Gold Coast Specialties, in Miami, Florida from which he purported to operate a mail order pornography business (Reporter's Transcript, pp. 172-175, hereinafter "RT").

On September 7, 1977, Livingston met petitioner in Los Angeles, California, where petitioner lived and worked. Petitioner was in the "adult" motion picture business and had business dealings in certain parts of the country (RT 176-187), but had never been to the

Southern District of Florida and had never shipped anything to the Southern District of Florida (Record on Appeal, pp. 206-215, hereinafter "ROA").

Petitioner and Livingston met a few more times, during which Livingston ordered sexually explicit films from him. Petitioner twice shipped such films from Los Angeles to Livingston in Miami (RT 177-218). The Central District of California, which includes Los Angeles, is a more liberal and tolerant community with respect to sexually explicit films than is the Southern District of Florida, which includes Miami (ROA 207-208).

Petitioner was subsequently indicted by a federal grand jury in the Southern District of Florida for shipping obscene films to such district. The District Court had jurisdiction pursuant to 18 U.S.C. Section 3231. His pretrial motions to dismiss and/or for a change of venue and his renewed post trial motion to

dismiss, all based upon improper forum shopping by the Government, were denied by the district court (RT 115-134; 549-553; ROA 206-215). Petitioner based his motions upon Blucher v. United States, 439 U.S. 1061, 99 S. Ct. 823, 59 L.Ed.2d 27 (1979).

Over petitioner's repeated objections, the district court selected prospective jurors from Dade County alone and not from the Southern District of Florida and subsequently instructed them to apply the community standard of Dade County alone, not the entire Southern District of Florida, which included Broward County, a more liberal and tolerant community than Dade County. Petitioner's request that at least Broward County's community standards be considered along with Dade County's was denied (RT 1-92; 134-135; 370-371; 434-444; 517-520).

Petitioner was convicted of shipping obscene films to the Southern District of Florida and sentenced to 18 months imprisonment and

a $5,000.00 fine. In addition, he was placed on probation for 5 years on condition he not distribute sexually explicit material to Florida (United States v. Bagnell, 679 F.2d 826, 829 (11th Cir. 1982).

On appeal petitioner renewed his argument that his case should have been dismissed or transferred to the Central District of California because the Government, in violation of Blucher v. United States, 439 U.S. 1061, 99 S.Ct. 823, 59 L.Ed.2d 27 (1979), deliberately chose to have him ship films to the Southern District of Florida, a district with which he had no prior contact, "because it believed that a jury applying the community standards of that district would probably find that the materials were obscene. ... "United States v. Bagnell, 679 F.2d 826, 830 (11th Cir. 1982).

The Court of Appeals accepted petitioner's characterization of the Government's conduct,

for the sake of argument, and concluded that the Government may properly engage in such conduct. The Court of Appeals below specifically agreed with the Tenth Circuit's opinion in United States v. Blucher, 581 F.2d 244 (10th Cir. 1978), notwithstanding the fact that this Court vacated the conviction in Blucher and ordered the indictment dismissed! See Blucher v. United States, 439 U.S. 1061, 99 S.Ct. 823, 59 L.Ed.2d 27 (1979).

With respect to petitioner's challenge to the utilization of the Dade County community standard instead of the Southern District community standard, and to the refusal of the district court to at least include one additional Southern District County - Broward County - the Court of Appeals below rejected his challenge and again based its decision on an appellate case which this Court vacated. The Court of Appeals below relied upon United States v. Groner, 479 F.2d 577 (5th Cir. 1973).

This Court vacated the decision in Groner v. United States, 414 U.S. 969, 38 L.Ed.2d 213, 94 S.Ct. 278 (1973).

Petitioner's requests for rehearing and rehearing en banc having failed, he now seeks review in this Honorable Supreme Court.

REASONS FOR GRANTING THE WRIT

1. WHETHER THE GOVERNMENT MAY INDUCE AN OUT-OF-STATE DISTRIBUTOR TO SHIP SEXUALLY EXPLICIT FILMS TO A FEDERAL DISTRICT WITH WHICH HE HAS HAD NO PRIOR CONTACTS AND THEN INDICT AND CONVICT HIM BECAUSE THE FILMS EXCEED THE COMMUNITY STANDARDS OF THE COUNTY TO WHICH THE MATERIALS ARE SHIPPED IS AN ISSUE WHICH THIS COURT SHOULD DECIDE

The decision below conflicts with this Court's ruling in Blucher v. United States, 439 U.S. 1061, 99 S.Ct. 823, 59 L.Ed.2d 27 (1979). This Court should grant certiorari to end the confusion generated by Blucher. Some courts have expressed doubt as to the significance of this Court's summary reversal of the obscenity conviction in Blucher. For example, the majority in the two-to-one decision in United States v. Peraino, 645 F.2d 548, 553 (6th Cir. 1981) stated:

> Though the reasons for its summary reversal are not clear, the Supreme Court's action in Blucher v. United States, supra, does raise a question....

What exactly did this Court do in Blucher? We must examine the facts and history of the case to try to determine the answer.

The facts in Blucher are set forth in the opinion of the Court of Appeals, United States v. Blucher, 581 F.2d 244 (10th Cir. 1978). Mr. Blucher, a mail order distributor of sexually explicit materials in the District of Oregon, thrice sent obscene materials to the District of Wyoming in response to requests by postal authorities. He also mailed on 17 occasions advertisements to the District of Wyoming. He had had no prior contact with the District of Wyoming. He was subsequently indicted in the District of Wyoming and convicted of mailing obscene matter. His conviction was affirmed by the United States Court of Appeals for the Tenth Circuit. Mr. Blucher then filed a petition for writ of certiorari in which he raised the following questions:

> "1. May the Government deliberately obtain the mailing of material believed to be obscene into a federal district of its choice for the purpose

of obtaining jurisdiction for criminal prosecution, where no other contact exists between the defendant and the subject jurisdiction? May the Government fabricate jurisdiction?

2. May a District Court constitutionally exercise jurisdiction in a criminal prosecution under the Comstock Act where the sole contact between the defendant and the community is the mailing of allegedly nonmailable material into the district at the request of the Government, made for the purpose of obtaining criminal jurisdiction in a community where it would otherwise not exist?"

Petition for Writ of Certiorari, pp. 2-3, Blucher v. United States, No. 78-571.

The Government filed a memorandum in this Court in which it asked the Court to

"vacate the judgment of the court of appeals and remand the case to the district court with directions to vacate its judgment and dismiss the indictment...." Memorandum of United States, p.6, Blucher v. United States, No. 78-571. This Court was not obligated to accept the Government's confession of error. In Young v. United States, 315 U.S. 257, 258-59, 86 L.Ed.2d 832, 834-35 (1942), the Court stated in response to the Government's confession of error,

> "The Government confessed error and we brought the case here. . . The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent. But such a confession does not relieve this Court of the performance of the judi-

cial function. The considered judgment of the law enforcement officers is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed. . . ."

In accordance with its acknowledged obligation to examine the issues independently, the Court did so in the Blucher case. After independent examination, the Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the District Court with directions to vacate the judgment of conviction and to dismiss the indictment. See Blucher v. United States, 439 U.S. 1061, 59 L.Ed.2d 27, 99 S.Ct. 823 (1979).

The action taken by the Court in Blucher was a decision on the merits which required the District Court and the Court of Appeals to follow it. Summary actions of the Court are precedents. See Hicks v. Miranda, 422 U.S.

332, 343-345 (1975). It is true that summary actions are entitled to less precedential value than full opinions. See Edelman v. Jordan, 415 U.S. 651, 670-77 (1974). However, the Court in Edelman v. Jordan said that it "is less constrained by the principle of stare decisis than [it is] in other areas of the law." Id. at 671. The Court did not say that lower courts, including courts of appeals, are free to disregard summary actions of the Supreme Court. Thus, it may very well be that if this Court grants certiorari it may feel less constrained by Blucher than by a full opinion. However, this does not mean that the lower courts were free to disregard it. Yet, that is precisely what the Court of Appeals has done here. It has expressed agreement with the Tenth Circuit notwithstanding the fact that its decision was vacated. Under these circumstances, petitioner believes that review by this Court is absolutely necessary. This is especially so in light

of the fact that Blucher has created confusion.

The Court of Appeals below made no attempt to distinguish the facts of this case from those in Blucher. It could not have done so since for all practical purposes they are the same, as the following table indicates:

BLUCHER CASE	BAGNELL CASE
1. Defendant resided in the District of Oregon which was more "tolerant" than the District of Wyoming.	Petitioner resided in the Central District of California, which was more "tolerant" than the Southern District of Florida.
2. Defendant shipped materials from a more tolerant district to a less tolerant district.	Petitioner shipped materials from a more tolerant district to a less tolerant district.
3. Defendant's only contacts with the Dis-	Petitioner's only contacts with the Southern

trict of Wyoming were those initiated and pursued by Government authorities - postal officials.	District of Florida were those initiated and pursued by Government authorities - the FBI.
4. Postal authorities used false names.	The FBI used false names.
5. Defendant willingly responded to postal authorities requests for materials.	Petitioner willingly (conceded for the purpose of this comparison only) respondend to FBI requests for materials.
6. Defendant was a distributor of sexually explicit materials in the District of Oregon.	Petitioner was a distributor of sexually explicit material in the Central District of California.

7. Defendant pleaded guilty and preserved for appeal the propriety of being tried in the District of Wyoming.	Petitioner made unsuccessful pretrial motions to change venue and to dismiss and a post trial motion to dismiss challenging the right of the Government to try him in the Southern District of Florida.

The decision below is extremely broad. Acknowledging that petitioner had never shipped to the Southern District of Florida and, indeed, had had no contacts with the district, and acknowledging that the Government first solicited the shipments by contacting petitioner in Los Angeles, where he lived and worked, United States v. Bagnell, 679 F.2d at 834, the Court of Appeals has held that the Government may engage in such conduct notwithstanding the

fact that the only case specifically dealing with the issue was vacated by this Court.

The Court of Appeal's conclusion that this Court's ruling in Blucher was not on the merits is based on Thompson v. United States, 444 U.S. 248, 249-50 (1980), but that case does not support such a conclusion. The fact that this Court has "consistently" vacated judgments in cases wherein the Government has requested it to do so does not mean that this Court is obligated to do so. See Young v. United States, 315 U.S. 257, 258 (1942), which makes it clear that the Supreme Court is not compelled to accept the views of the Department of Justice.

Petitioner submits that it is fundamentally unfair and thus violative of due process for the Government to manufacture jurisdiction by inducing an out of state distributor with no prior contact with the district to ship sexually explicit films to such district. This contention, of course, is unique to materials, such as motion

picture films, which are presumptively protected by the First Amendment. See Jenkins v. Georgia, 418 U.S. 153 (1974). It would not apply to non First Amendment conduct such as the distribution of drugs. Given this Court's holding that community standards may vary from district to district, Hamling v. United States, 418 U.S. 87 (1974), the Government should not be permitted to induce one to ship "adult" films to a district with which he has had no prior contacts. When a "customer" orders films he implicitly asserts that the community to which the films are to be shipped tolerates such films. Of necessity the distributor must rely on this implicit representation because he cannot possibly know the community standards of every district in the country. If the Government wishes to prosecute someone in a particular district it should have some evidence that the person has previously shipped to such district. Otherwise, the Government

should limit prosecution to the district wherein the suspect does business. See United States v. Langford, 688 F.2d 1088 (7th Cir. 1982).

At a minimum, a person who has been induced to ship such materials should at least be able to urge the defense of entrapment. The Court of Appeals rejected this argument.

Finally, it is no answer to say that the Government also induced others to ship "adult" materials to Miami. If it is wrong as to one person it is wrong as to all.

2. WHETHER THE RELEVANT COMMUNITY IN A FEDERAL OBSCENITY CASE INVOLVING AN OUT OF STATE DISTRIBUTOR CAN BE SMALLER THAN THE FEDERAL DISTRICT TO WHICH THE DEFENDANT SHIPPED ALLEGEDLY OBSCENE FILMS AND WHEREIN HE IS TRIED IS AN ISSUE WHICH THIS COURT SHOULD DECIDE

In the instant case petitioner was indicted for sending obscene materials to "the Southern District of Florida." Districtwide community

standards had traditionally been used in obscenity cases. See, e.g., United States v. Marks, 520 F.2d 913 (6th Cir. 1975), reversed on other grounds, Marks v. United States, 430 U.S.188 (1979); United States v. Cohen, 583 F.2d 1030 (8th Cir. 1978); United States v. Danley, 523 F.2d 369 (9th Cir. 1975), cert. denied, 424 U.S. 929 (1976). Presumably when petitioner made the decision to ship the materials he could rely on the fact that Broward County, a very liberal and tolerant county, was a part of the Southern District of Florida. Whether the most liberal part of a federal district can be excised so as to increase the chances of conviction is a matter which should be resolved by this Court.

Petitioner submits that it was improper for the District Court to reject the community which was alleged in the Indictment and select a more conservative, smaller community. Since petitioner was accused of shipping obscene

films to the Southern District of Florida he should have been tried for that offense. Petitioner repeatedly requested that the community be defined as the Southern District of Florida or, at a minimum, that it at least include Broward County, which is immediately north of Dade County and which includes the more liberal community of Fort Lauderdale, where Deep Throat played.

Although there have been no decisions by this court directly on point, Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974) and Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260, 97 S.Ct. 990 (1977) support petitioner's contention herein that in federal obscentiy cases the community consists of the federal district. In upholding an obscenity conviction, this Court in Hamling stated,

"... Since this case was tried in the Southern District of California

and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw...." Id. at 613-14.

In United States v. Marks, 520 F.2d 913 (6th Cir. 1975), the Court of Appeals approved a jury instruction that "the contemporary community standards would be comprised of the Eastern District of Kentucky...." Id. at 918. This Court reversed Marks on a different point - that the due process/ex post facto protection of the Constitution was violated because the jury was instructed as to the new obscenity test even though the "crime" was committed prior to the adoption of the new obscenity test. See Marks v. United States, supra.

Petitioner submits that the District Court herein likewise violated due process/ex post facto principles by utilizing a geographic com-

munity which was not previously defined for the purpose of a federal obscenity case. Moreover, Hamling and sound policy would prevent the utilization of small geographic areas within federal districts for federal obscenity prosecutions. The burden would be too great. A person shipping sexually explicit materials to, for example, the Southern District of Florida relies on the fact that the liberal community of Fort Lauderdale, in Broward County, is a part of the relevant community. It is not fair to indict a defendant for shipping obscene materials to the Southern District of Florida, and then reject that district for the trial.

The Court of Appeals relied upon United States v. Groner, 479 F.2d 577 (5th Cir. 1973). It rejected a national standard in favor of a local standard, and is not authoritative since it dealt with the question of whether local or national standards should be used. The Court was not asked to decide whether the appropri-

ate community could be something smaller than a federal district. Moreover, this Court vacated the Fifth Circuit's Groner decision in Groner v. United States, 414 U.S. 969, 38 L.Ed.2d 213, 94 S.Ct. 278 (1973). On remand, the Fifth Circuit again affirmed the conviction. See United States v. Groner, 494 F.2d 499 (5th Cir. 1974), cert. denied 419 U.S. 1010, 42 L.Ed.2d 285, 95 S.Ct. 331 (1974). The decisions do not deal with the issue of applying a county-wide vs. district-wide standard.

The Northern District of Iowa was determined to be the appropriate community in United States v. Cohen, 583 F.2d 1030 (8th Cir. 1978) even though the jurors came from the Western Division of the Northern District. Cf. United States v. Dachstainer, 518 F.2d 20 (9th Cir. 1975), cert. denied, 421 U.S. 954, 44 L.Ed.2d 107, 95 S.Ct. 1688 (1975): In rejecting the defendant's argument that a national community standard instruction should not have been

given, the Ninth Circuit did impliedly concede that the appropriate community was the Northern District of California. In United States v. Danley, 523 F.2d 369 (9th Cir. 1975), cert. denied 424 U.S. 929, 47 L.Ed.2d 338, 96 S.Ct. 1143 (1976), the Court approved the use of statewide community standards and wider standards in a federal prosecution where the district consisted of the entire state.

In rejecting petitioner's request and in ruling that the community would be only Dade County, the District Court may have relied on Florida law although none was cited by the Government or the Court. Florida state law does seem to authorize the use of one county in state obscenity cases. See Davison v. State, 288 So.2d 483 (1973) and Johnson v. State, 351 So.2d 10 (1977) where the Florida Supreme Court held that in state obscenity cases a local county standard and not a Florida statewide standard applies. While the Florida Supreme

Court may have some company,[1] most states have rejected the utilization of local standards in favor of a statewide standard. The courts of California,[2] Colorado,[3] New York,[4] Texas,[5] Washington,[6] and Wisconsin[7] have

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1/ The Georgia Supreme Court utilized a local, not statewide, standard in Jenkins v. State, 230 Ga. 726, 199 S.E.2d 183 (1973), rev'd on other grounds, Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 94 S.Ct. 2750 (1974). The Alabama Court of Criminal Appeals also used a local standard in Brazelton v. State, 50 Ala. App. 723, 282 So.2d 342 (1973).

2/ In re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535 (1968).

3/ People v. Tabron, 544 P.2d 380 (1976).

4/ People v. Heller, 33 N.Y.2d 314, 352 N.Y.S. 2d 601, 307 N.E.2d 805 (1973).

5/ La Rue v. State, 611 S.W.2d 63 (1980).

6/ State v. J-R Distributors, Inc., 82 Wash.2d 584, 512 P.2d 1049 (1973).

7/ Court v. State, 63 Wis.2d 570, 217 N.W.2d 676 (1974).

rejected local standards in favor of statewide standards.

State law, however, does not control federal obscenity prosecutions. In Smith v. United States, 431 U.S. 291, 52 L.Ed.2d 324, 97 S.Ct. 1756 (1977), the defendant was indicted for mailing obscene materials from Des Moines, Iowa, to Mount Ayr, Iowa, and Guthrie Center, Iowa, all of which were located in the Southern District of Iowa. See 28 U.S.C. section 95. Although the entire state of Iowa had repealed its obscenity statutes and although the entire transaction was intrastate, this Court affirmed the obscenity conviction.

The Court stated that the state legislature's determination not to prosecute obscenity cases was not binding upon federal courts in Iowa. The Court stated,

> "An even stronger reason for holding that a state law regulating distribution of obscene material cannot

define contemporary community standards in the case before us is the simple fact that this is a federal prosecution under section 1461...." (emphasis in original). Id. at 303.

No matter how valid Florida's method of handling state obscenity violations might be, its willingness to permit each county to determine its own community standards cannot be binding upon a federal court in Florida. It may very well be that a local distributor of sexually explicit material should know or could be expected to know the community standards of each county. It is far different for an out-of-state distributor to know each county's standards. The difficulties imposed by Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973), which rejected a national standard in favor of state standards, would be impossible to overcome if a national distributor were required to know the standards of

each county of every state in the country.

There is no controlling decision by the Court and there are conflicting decisions by various circuit courts. Therefore, it would seem to be appropriate for this issue to be resolved by this Court. It is a significant issue because one elementary principle of due process - notice - requires that all elements of the crime, including in this case the relevant community, be defined in advance. This is recognized by the Sixth Amendment's requirement that the "[d]istrict shall have been <u>previously</u> ascertained by law...." (Emphasis added).

CONCLUSION

For the foregoing reasons, petitioner respectfully urges this Honorable Court to grant certiorari and reverse the judgment below.

Respectfully submitted,

ROGER JON DIAMOND

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